"When the question arises whether a mark applied for bears such resemblance to another mark as to be likely to deceive, it should be determined by considering what is the leading characteristic of each. The one might contain many, even most, of the same elements as the other, and yet the leading, or it may be the only, impression left on the mind might be very different. On the other hand, a critical comparison of two marks might disclose numerous points of difference, and yet the idea which would remain with any person seeing them apart at different times might be the same".

In *Johnston* v. *Orr-Ewing*[3] an injunction was granted in circumstances where marks consisting of tickets bearing pictures of two elephants with a banner between them, the figures being differently arranged, though unlikely to be mistaken, one for the other, were held to be such that "it might easily happen that they might both be taken by natives of Aden or of India, unable to read and understand the English language, as equally symbolical of the plaintiffs' goods."

In the present case I find that the defendants' mark is such that, although it may disclose a number of points of difference from the plaintiffs' mark such as in the number of leaves and in the size or shape of the flower depicted thereon or in the absence of the enclosing red circle, the idea which would remain with any person seeing them apart at different times might be the same.

The "idea of the mark" of the plaintiff is a red flower with green leaves against a yellow background. This is the same idea with which one is left after viewing the defendants' mark. Having regard to the history of the defendants' adaptation of D.W.3's representation of an entirely different-coloured sun flower with leaves after both the second defendant and D.W.3 had abruptly severed connection with their former employer in 1959, to its present representation of a red sun flower with green leaves against a yellow background it is difficult to say that their present mark is substantially different from that of the plaintiffs. I would go further to hold that they have deliberately imitated the plaintiffs' mark, albeit retaining the former sun flower depiction said to have been originated by D.W.3, by adopting the hues which are the distinguishing characteristics of the plaintiffs' mark.

I have borne in mind the principles of law laid down by our own Court of Appeal in *Asia Organisation Ltd.* v. *White Hudson & Co., Ltd.*[4] (the Hacks/Pecto sweets case) and I do not think I have departed from such tests as may have therein been laid down with regard to deceptive resemblance. As Ambrose J., citing from *Dunhill* v. *Bartlett & Bickley*[5] 438, said—

"Apart from monopolies conferred by patents, and apart from protection afforded by registration, it is open to anyone to adopt the ideas or devices of his neighbour ....provided he clearly distinguishes his goods from that of his neighbour."

In this case the plaintiffs' mark is protected by registration.

The plaintiffs' flower has been variously described as a rose, a "bungaraja", a peony and a nondescript flower trading under the general description of "bunga".

The defendants' flower purports to be a sun flower. It is doubtful how many customers would readily recognise it as such. It is even more doubtful how many would have the experience of florists or botanists to be able to identify a flower possessing the qualities depicted as a sun flower on seeing that its petals are red and that its centre is yellow with very slight red and green dashes and dots. The plaintiffs' flower has red petals and a yellowish centre with slight green dashes.

Seeing the marks as wholes one is driven to the conclusion that the plaintiffs' registered mark deserves the Court's protection, "in the interests of honest trading and general commercial morality" (Harman J. in *M. Saper Ltd.* v. *Specter's Ltd. and Boxes Ltd.*[6]).

As *Kerly* says at page 409

"the tribunal ought not merely to look at the marks as they stand side by side, for, from the nature of the case, they would not be so put before any customer whom it is sought to deceive by means of either of them. He can only contrast the mark upon the goods offered to him with his recollection of the mark used upon those he is seeking to buy, and allowance must be made for this in estimating the probability of deception. Any other rule would be of no practical use."

It must further be borne in mind that the ordinary purchaser has only an ordinary memory and the Court must be careful to make due allowances for imperfect recollection.

In all the circumstances therefore I am satisfied that the plaintiffs' claim for an injunction should succeed and judgment will therefore be entered for them with costs. I also order that the offending labels, prints or wrappers be delivered up to the plaintiffs for destruction. I am prepared to consider submissions on the question of damages.

Judgment for the plaintiff.

Solicitors:—*Lee & Lee; Muthu & Co.*

SAN SEONG CHOY & ORS. v. YUSON BIEN

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) May 20, 1963]

[K.L. — F.M. Civil Appeal No. 63 of 1962]

Evidence—Road collision—Vehicles travelling in opposite directions—Conflicting evidence—Guide by which evidence can be tested.

Damages—Personal injuries—Fracture of right femur, and humerus, left wrist, and radius and ulna of left forearm—Permanent disablement—Assessment of special and general damages.

This was an appeal from the decision of Ismail Khan J. ([1962] M.L.J. 427). It was argued that the learned trial judge should have held on all the evidence that the defendant had not discharged the onus of showing that the other driver (the third appellant) rather than himself was negligent and should have found the defendant at least equally to blame for the accident.

Held: (1) a careful study of the plans and photograph in every way confirmed the evidence of the respondent and the findings of negligence by the learned trial judge;

(2) the award of $80,000 for general damages and $19,572.17 special damages should be reduced to $50,000 for general damages and $15,480.75 as special damages.

COURT OF APPEAL.

Denis Murphy for the appellants.

W. H. Sault (*F. Keith Sellar* with him) for the respondent.

Thomson C.J.: I have had the benefit of reading the judgment of Hill, J.A.

For reasons which follow those stated by His Lordship I agree that as regards the question of liability the appeal should be dismissed. I also agree that the special damages should be reduced to $15,480.75 and the general damages to $50,000.

Hill J.A.: This is an appeal from the decision of Ismail Khan J. in Seremban Civil Suit No. 42 of 1959. The three appellants were the plaintiffs in the lower Court and Khan J. entered judgment for the defendant/respondent, who had counter-claimed, for $80,000 general damages and $19,572.17 as special damages, a total of $99,572.17 with costs.

The actions arose from a road accident between two cars driven by the third appellant and the respondent respectively. I cannot do better than repeat the following brief summary of the eye-witnesses' evidence given by the learned trial judge:—

"The accident occurred some time after 2 p.m. on 23rd August, 1958, near the 9th mile south of Seremban, on the Seremban/Tampin Road. A Simca car, T. 4148, (hereinafter called the T. car) driven by the third plaintiff was on its way from Singapore to Kuala Lumpur. It carried four people, three of whom were the first, second and third plaintiffs, the fourth being a sister of the second plaintiff. The first plaintiff was the owner of the car and the three plaintiffs and the sister of the second plaintiff suffered various degrees of injury. The car was a total wreck and the plaintiffs claim damages from the defendant who was the owner and driver of the other vehicle, also a Simca car M. 6716 (hereinafter called the M. car). The defendant denied the allegation of negligence made by the plaintiffs against him of having driven over the centre line of the road and he counter-claimed against the first and third plaintiffs for damages for the latter's negligence on the very same ground.

The plaintiffs' story may be told in a few words. At the 9½ mile Seremban/Tampin Road their car was negotiating a left-hand bend and proceeding up a slight incline at a speed said to be 30 to 35 miles an hour. There was a yellow line along the centre of the road and the car was keeping to the left of the line. The M. car then appeared from the opposite direction, crossing over the yellow line on to the plaintiffs' side to the extent that, according to the third plaintiff, three-quarters of the M. car was over the line. The third plaintiff immediately applied his brakes but could not avoid the collision.

The defendant's evidence is that he left Seremban to go to his estate. Near the 9th mile he had to negotiate at low speed a sharp S-bend over a railway line. About 400 feet beyond the bridge, and as he was approaching a bend, he saw the T. car coming towards him at a very great speed along the centre of the road. He braked and had come to a stop near the grass verge on his own side when the collision occurred."

Khan J. found that the encroachment by the T. car on its wrong side of the road was the sole cause of the accident and as a natural corollary he found that the negligence of the third appellant was therefore the sole and effective cause of the accident.

The appellants contended and it was strenuously argued before this Court on their behalf by Mr. Murphy that the learned trial Judge should have held on all the evidence that the defendant had not discharged the onus of showing that the other driver rather than himself was negligent and should have found him at least equally to blame for the said accident.

Though there were no less than 25 grounds in the memorandum of appeal devoted to the above argument and though the hearing lasted a day and a half, I think the matter can be disposed of quite briefly.

As Ismail Khan J. indicated the drivers and witnesses told conflicting stories, but there was in evidence before him numerous photographs, plans, some of which were to scale, and measurements which certainly appear to be accurate. The trial Judge has been criticised for not dealing more specifically than he did with the oral evidence, but he found as a fact (p. 111F) "that upon the defendant becoming aware of the dangerous situation he immediately pulled up on his side of the road" and this is precisely what the respondent claimed that he did.

The trial judge reasoned that where, as in this case, the drivers and witnesses on each side tell conflicting stories, the photographs, plans and measurements of the scene, and the nature of the damage to each vehicle must provide the most reliable guide by which such evidence can be tested. He was satisfied with the correctness of the main plan and was of opinion that two photographs, exhibit P. 1 and P. 2C, shewed clearly enough what led to the collision. He stated "The brake-marks indicate that the T. car started to take the bend close to the near-side edge of the road. Despite forcible application of the brakes at that stage, the car still swung away from the edge towards the opposite

side. The braking therefore was ineffective for bringing the steered course under immediate control, because throughout the 60 feet of braking the car was continuing to go further away from its own side of the road. The obvious reason must be that the driver was taking the bend at an excessive speed and the curve was sharper than he had anticipated." In other words the 3rd appellant took the bend in T. car much too quickly and swinging out over to his wrong side of the road collided with the M. car.

For myself after a careful study of the plans and photographs I have come to the conclusion that they in every way confirm the evidence of the respondent and I therefore respectfully agree with the findings of negligence by the learned trial judge.

With regard to the question of damages, it was agreed by Mr. Sault for the respondent that the award for special damages should be reduced from $19,572.17 to $15,480.75. This latter figure includes an allowance for loss of bonus from $10,000 to $6,000. The respondent had been employed as manager of Ulu Lengeng Estate, Tampin. After the accident he was employed at a much reduced salary in the office and as the reduction in bonus coincided with his reduction in status it seems a reasonable assumption that the one resulted from the other.

With regard to the award of $80,000 for general damages, my immediate reaction on first reading the record was "that's too high". I still think it is, though I am very conscious of the fact that it is a mere difference of opinion between the learned trial judge and myself.

But the respondent's employment was not in fact as secure as Khan J. seemed to have believed. In fact the Ulu Lengeng Estate has been sold since the accident. In all the circumstances I feel that a more realistic figure would be $50,000 a sum that will compensate the respondent for loss of salary for a number of years.

I would therefore vary the order of the lower Court by reducing the award for general damages to $50,000 and for special damages to $15,480.75.

I think the respondent should have all his costs in the lower Court and four-fifths of the costs of this appeal.

Barakbah J.A.: I have had the advantage of reading the judgment of my brother Hill J.A. with which I agree and have nothing to add.

Appeal dismissed. Damages reduced.

Solicitors:—*Murphy & Dunbar; Sault, Keith Sellar & Co.*

KHONG KIT SENG & ANOR. v. NIBLOCK

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) May 20, 1963]

[K.L. — F.M. Civil Appeal No. 4 of 1963]

Solicitor and client—Costs paid on lump sum basis—Client a limited company—Winding-up—Liquidator asking for delivery of detailed bill of costs and taxation.

Practice and Procedure—Company winding-up—Liquidator asking for detailed bill of costs from company's solicitor who was paid lump sum—Whether proceedings commenced by originating summons in liquidator's name a nullity or irregularity.

In this case the appellants, solicitors, did some work for an insurance company in 1961 and were paid for in a lump sum. Early in 1962 the company went into liquidation under a winding-up order. On examination of the transaction between the appellants and the company the liquidators in the name of one of themselves commenced proceedings against the appellants asking for a delivery of a detailed bill of costs and taxation of the same. The appellants sought to strike out the proceedings on grounds, *inter alia*, that the proceedings should have been commenced not in the name of the liquidator but in the name of the company.

Held: the commencement of the proceedings by the liquidator in his own name was neither a nullity nor an irregularity.

Cases referred to:—

(1) *In re James* 4 DeG. & Sm. 183.

(2) *In re Marseilles Extension Railway and Land Company* L.R. 11 Eq. 151.

(3) *In re Foss* [1912] 2 Ch. 161.

(4) *In re Palace Restaurants, Ltd.* [1914] 1 Ch. 492.

COURT OF APPEAL.

Lim Kean Chye (*N. H. Chan* with him) for the appellants.

Y. S. Chong for the respondent.

The liquidator of an insurance company in his own name and describing himself as such liquidator took out an originating summons under the Advocates and Solicitors Ordinance, 1947, against the partners of a firm of solicitors for an order, *inter alia*, that the solicitors' costs may be taxed. The solicitors applied in Chambers for the originating summons to be set aside on the grounds, *inter alia*, that the liquidator was not a competent or proper party to the proceedings and that the form was bad as the Originating Summons was not cast in the proper form.

The learned Judge held that the description of the plaintiff as "Anthony Niblock, Liquidator, Venhen Assurance Company Ltd. (In Liquidation)" was a minor irregularity and ordered under O.70 that the name of the company be substituted therefor. The Judge also held that the use of the form of the Originating Summons was a mere irregularity and cured the irregularity under O.70.

The solicitors appealed.

N. H. Chan: Actions are brought or defended in the company's name, unless an order is made under s. 185 Companies Ordinance vesting the estate in the liquidator: 6 Halsbury's Laws (3rd ed.) pp. 559, 616, 586; *Re Sartoris* [1892] 1 Ch. at p.14. This is not a case of misnomer or misdescription: *Whittam* v. *W. J. Daniel*